UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

G4S SECURE SOLUTIONS (USA) INC.
f/k/a G4S REGULATED SECURITY SOLUTIONS, INC.
f/k/a THE WACKENHUT CORPORATION

and Case 12-CA-26644

THOMAS FRAZIER, an individual Case 12-CA-26811

CECIL MACK, an individual

RESPONDENT'S POST COMPLIANCE HEARING BRIEF

On May 23, 2018, a hearing was conducted before Administrative Law Judge Robert Ringler regarding the allegations in the Amended Compliance Specification ("Compliance Specification"), General Counsel Exhibit 1(e). Respondent G4S Secure Solutions (USA) Inc. ("Respondent") hereby offers the following arguments regarding certain allegations set forth in the Compliance Specification and the manner in which backpay and related items should be calculated in this case.[1]

1. The Compliance Specification does not properly account for interim earnings as of the date on which Mr. Mack started working for Rent A Wheel.

It is undisputed that Mr. Mack started working for Rent A Wheel "in the middle of August 2010." (Transcript of May 23, 2018 Hearing ("Tr.") at 31.) When asked if he could provide more detail on the specific date on which he started working, Mr. Mack responded that he could recall that he started working for that company right in the middle of the month, but could not provide

[1] It is anticipated that Counsel for the General Counsel will renew his objection to any effort on the part of Respondent to challenge any issue related to interim earnings, as opposed to mitigation efforts, based on his argument that Respondent did not preserve the right to make such arguments in its Answer. However, as Respondent's counsel explained at the Hearing which, for some reason, does not appear in the Transcript, Respondent maintained the right to raise such issues in paragraph 6(g) of its Answer to Amended Compliance Specification, General Counsel Exhibit 1(r).

any greater specificity on the precise date. (Tr. at 67.) Mr. Mack was paid approximately $44,000 per year in that position. (Tr. at 34.)

As set forth in the Compliance Specification, Appendix H, Mr. Mack was credited with only $901.94 of interim earnings for the third quarter of 2010, which resulted in net backpay of $18,941.28 for that quarter. Based on Mr. Mack's testimony that he started with Rent A Wheel "right in the middle" of August 2010, that means he started working in that position on or about August 16, 2010. Based on annual compensation of approximately $44,000 per year, he had interim earnings equal to $846.15 per week from August 16, 2010 through September 30, 2010, for total interim earnings in that quarter of $5,923.08 (rather than the $901.94 of interim earnings shown in the Compliance Specification). That means the net back pay for the third quarter of 2010 should be $13,920.14 (rather than $18,941.28).[2]

2. The Compliance Specification does not properly account for interim earnings in the first two quarters of 2011.

Mr. Mack was making approximately $44,000 per year in his position with Rent A Wheel (Tr. at 34), which equates to approximately $846.15 per week. Although the first quarter of 2011 consisted of thirteen weeks, the Compliance Specification, Appendix H, only lists interim earnings of $9,230.75 for that quarter, rather than $10,999.95 (13 weeks x $846.15 per week). As such, the net backpay for the first quarter of 2011 should be $9,011.21 (rather than $10,780.40).

In addition, Mr. Mack was terminated from Rent A Wheel in "about the middle" of June 2011. (Tr. at 35.) Assuming that Mr. Mack was terminated no earlier than June 17, then he was making approximately $846.15 per week from the start of the third quarter of 2011 until June 17,

[2] It should be noted that any decrease in the amount of net backpay will also have a corresponding impact on any interest and excess tax liability calculations.

which is a total of eleven weeks. That results in total interim earnings for that quarter of $9,307.65 (rather than $8,557.60). As such, the next backpay for the second quarter of 2011 should be $10,703.51 (rather than $11,453.56).

3. Since Mr. Mack was terminated from Rent A Wheel for an offense involving moral turpitude, the Compliance Specification should reflect continued interim earnings at that position from the middle of June 2011 until February 2012.

It is undisputed that Mr. Mack was terminated by Rent A Wheel in the middle of June 2011 for "taking an improper payment." (Tr. at 35.) While the details surrounding that incident are not entirely clear, it ***is*** clear that Rent A Wheel terminated Mr. Mack for conduct that it viewed as essentially fraudulent. Mr. Mack attempted to explain what he was doing with customer payments:

> The way it works, if – we have is what is called a receivable balance. So if a customer comes and they make a payment, if they make an extra, an extra 50 bucks, after 100 bucks, that money goes into what is called their receivable account. So when they want to pay off their account, they just use that money that they have already credited to their account to bring down their balance, and they just pay off their remaining balance.
>
> When I was in training, it was, it was common practice or how I was taught that if a, if a customer comes and they paid a – and they pay their account off before they are actually due, we'll just put all the money into that receivable balance, and then when they are due, we'll pay them off, kind of not, you know, ***don't take so many losses in one day***. But at that time it was the beginning of the quarter. A lot people was getting their income tax returns, so a lot of people was paying their accounts off because once you pass 90 days, it splits to a dollar and a half.
>
> So, you have like a 90, like a 90-day same as cash deal, so a lot of people they come in, they come in December, they get wheels, and they try to pay it off with their income tax. I had a lot of money in my receivable account, and my district manager did an audit and saw that I had so much money in there, and I didn't know at the time that that was against company policy.

(Tr. at 35-36 (emphasis added).)

Mr. Mack offered the following, further explanation when asked about the incident again on cross-examination:

A. Let's say for instance you come, you owe 500 bucks on a jacket. You put – but your bill is only $50. So you give me $150 on the date that your bill is due. So the $50 goes towards your bill, and the $100 goes into your receivable account so you have an extra $100 in so next week or next time your account is due, if you want to pay your account off, you pay your account off minus whatever you have in your receivable account.

. . .

Q. What does the company think should have happened with that money instated of what was happening with the money?

A. You mean far as paying the account off?

Q. Correct.

A. It should have been paid off right as soon as they paid it and not being held until their due date.

. . .

Q. Is there, is there an advantage to the customer in it being done that way?

A. No. It's an advantage to the company, I would guess.

Q. Why would you guess that?

A. Why else would you – why else would you want to lose three or four accounts in one day?

Q. I don't – what do you mean by that?

A. If a customer pays their account off – if a customer pays their account off, then you no longer have that customer on your books, meaning your store doesn't look as big as it is.

(Tr. at 76-77.)

It is undisputed that Rent A Wheel terminated Mr. Mack for doing something improper with customer payments. Based on Mr. Mack's testimony, Rent A Wheel believed that his actions constituted a type of fraudulent practice because Mr. Mack's conduct allowed Mr. Mack (and his store) to show that he had more "open accounts" (and customers) at any given time than would be the case if customers' payments were applied to pay off their accounts as soon as the customer had paid the money to Mr. Mack. Also, by failing to apply the customers' payments to their balances at the time the money was received, that practice increased the odds that customers would not pay

off their accounts on time – within 90 days – in which case Rent A Wheel (and presumably Mr. Mack) would benefit from all the additional interest that then would be owed by the customer.

While a termination from interim employment generally will not toll backpay, a termination will toll backpay if the discharge is based on deliberate or gross misconduct on the part of the discriminatee so as to establish a willful loss of employment, or if the discriminatee commits an offense involving moral turpitude or that is so outrageous as to suggest deliberate courting of termination. *See, e.g.,* NLRB Casehandling Manual (Part Three) Compliance Section 10558.4; *Ryder System, Inc.*, 302 NLRB 608, 610 (1991); *P*I*E Nationwide*, 297 NLRB 454, 454 (1989).

It is instructive that, although Mr. Mack testified he was initially awarded unemployment benefits by the State of Florida, after Rent A Wheel contested the award, the State determined that Mr. Mack was not entitled to benefits. (Tr. at 38.) The standard for the denial of benefits is quite stringent. Although there are other possible reasons why a claimant could be denied benefits (*e.g.* failure to earn sufficient wages from that employer over a specific period of time, Fla. Stat. Ann. § 443.091(3)(g)), it can reasonably be assumed that Rent A Wheel contested the award of benefits to Mr. Mack based on the misconduct for which it terminated him: taking improper payments which, as Mr. Mack testified, constituted an alleged violation of Rent A Wheel policy.[3] (Tr. at 75.)

Florida's unemployment compensation statute, in relevant part, defines "misconduct" that disqualifies a claimant for benefits as follows:

[3] Mr. Mack presumably met the threshold for eligibility for benefits based on amount of wages earned, period of time, etc., since the State initially awarded him benefits.

> "Misconduct," irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, . . . A violation of an employer's rule, unless the claimant can demonstrate that:
>
> a. He or she did not know, and could not reasonably know, of the rule's requirements;
>
> b. The rule is not lawful or not reasonably related to the job environment and performance; or
>
> c. The rule is not fairly or consistently enforced.

Fla. Stat. Ann. § 443.036(29)(e)(1).

Mr. Mack testified at the Hearing that, as far as he was concerned, his conduct in question was permissible. (Tr. at 36.) He also testified at the Hearing that he was never told the conduct was not permissible, that no handbook or manual indicated the conduct was not permissible and that he was trained by the store manager (at the time he was hired) to handle such matters in the manner in which he did so (and then was terminated). (Tr. at 37.) As such, based on Mr. Mack's testimony at the Hearing, if his version of events is accurate, he would have been able to prove to the State of Florida that he did not know, and could not have known, about the rule (or policy) that he supposedly violated and for violation of which Rent A Wheel terminated him. In turn, based on such evidence, Mr. Mack would have been able to demonstrate that he did not engage in "misconduct" for which he could be denied unemployment benefits under Florida law. Mr. Mack failed to do so. As such, it is relevant that Rent A Wheel was able to meet the requisite standard and convince the State to deny Mr. Mack benefits based on this standard.

Mr. Mack implied in his testimony it was relevant that he did not appear at the unemployment hearing at which Rent A Wheel was able to get his award of benefits reversed, because he did not receive (or, more accurately, see) the notice of hearing on time (since he was in the process of moving). However, even if Mr. Mack did not appear at that hearing, Rent A

Wheel still had the burden of proving, by a clear preponderance of the evidence, both that the act or acts alleged were committed and that Mr. Mack's actions constituted "misconduct" under the statutory definition. *Benitez v. Girlfriday, Inc.*, 609 So. 2d 665, 666 (Fla. 3rd DCA 1992); *Tallahassee Housing Authority v. Florida Unemployment Appeals Commission*, 483 So. 2d 413 (Fla. 1986). *See also Williams v. Florida Dep't of Commerce, Industrial Relations Com.*, 326 So. 2d 237 (Fla. 3rd DCA 1976) (where doubts regarding the alleged misconduct are "nicely balanced," they are to be resolved in favor of the claimant).

Moreover, even if Rent A Wheel was able to convince the State to deny benefits only because Mr. Mack was not able to attend that hearing (because he did not receive notice), Mr. Mack did not suggest that he took advantage of his legal right to challenge that decision. First, if he could demonstrate that he missed the hearing for good cause, he would have been entitled to a new hearing.[4] Mr. Mack did not say anything to demonstrate that he attempted to pursue this option, despite the fact that he had to repay approximately $3,000 in benefits as a result of the decision rendered in the hearing he missed. (Tr. at 39.)

Second, Mr. Mack could have appealed the decision once he became aware that his award of benefits had been reversed.[5] A request for such an appeal hearing could have been filed within twenty calendar days after the determination was mailed or delivered to him. Fla. Stat. Ann. §

[4] According to the Florida Department of Economic Opportunity's ("DEO") website, if an unemployment compensation benefits claimant misses a hearing, for good cause, he or she may request a new hearing by writing to the hearing officer by mail or fax, or by following the prompts in CONNECT, *available at* http://www.connect.myflorida.com. *See* DEO's Claimant FAQ page, *available at* www.floridajobs.org/job-seekers-community-services/reemployment-assistance-center/claimants-faqs. (CONNECT is the website used by claimants to initiate claims for unemployment compensation benefits in Florida.)

[5] The written decision of the appeals referee would have provided Mr. Mack with information on his appeal rights. Fla. Stat. Ann. §441.151(4)(b).

443.151(4)(b)(1).[6] While Mr. Mack claims to have not received notice of the appeal hearing, he did not suggest in any way that he failed to receive the referee's decision denying him benefits. In fact, he testified that as a result of that decision he had to repay almost $3,000 in benefits he already had received. (Tr. at 39.) Therefore, the fact that the State of Florida denied Mr. Mack benefits (and that Mr. Mack did not attempt to or failed to get that decision reversed) demonstrates that Mr. Mack engaged in the type of misconduct that tolls back pay in this proceeding.

Since Mr. Mack was terminated by Rent a Wheel for an act involving moral turpitude – improper payments – backpay should be tolled from the time of that termination until he was hired by Rent a Center in February 2012. As such,

(a) his interim earnings for the second quarter of 2011 should be approximately $11,000.00 (rather than $8,557.60), which would result in net backpay of $9,011.16 (rather than $11,453.56);

(b) his interim earnings for the third quarter of 2011 should be approximately $11,129.95 (rather than $0.00), which would result in net backpay of $8,881.21 (rather than $20,011.16);

(c) his interim earnings for the fourth quarter of 2011 should be approximately $11,129.95 (rather than $0.00), which would result in net backpay of $10,420.53 (rather than $21,550.48); and

[6] A party who is dissatisfied with the decision may file a request for review with the DEO Reemployment Assistance Appeals Commission ("RAAC"). An RAAC order can also protested by filing an appeal with the appropriate Florida District Court of Appeals. Fla. Stat. Ann. § 443.151(4)(e). This can be accomplished by mail or overnight delivery, by sending a fax to the RAAC at (850) 488-2123, or by logging on to http://www.raaciap.floridajobs.org.

(d) his interim earnings for the first quarter of 2012 should be approximately $10,101.63 (rather than $4,178.58), which would result in net backpay of $10,113.34 (rather than $16,036.39).

4. Since Mr. Mack did not search for interim employment in December 2011, the Compliance Specification should reflect that impact on backpay for the relevant quarter.

Mr. Mack admitted that, because of the holidays, he did not search for employment during the month of December 2011. (Tr. at 50-51.) As such, he was "unavailable for work" that month and the backpay calculations should reflect that fact. *See, e.g.*, NLRB Casehandling Manual (Part Three) Compliance Section 10560.1 ("When a discriminatee becomes unavailable for employment . . . , gross backpay is generally tolled for the period of unavailability.").

In light of the wage rate for the types of interim employment available at the time, Respondent does not contend that backpay for December 2011 should be reduced based on the amount that Respondent would have been paying Mr. Mack had he been employed by Respondent at that time (approximately $6,639.92 for the month of December 2011). Rather, Respondent contends that backpay should be reduced by $3,384.60, which would represent one month's wages at the rate Respondent was paid while employed at Rent A Wheel ($44,000.00 per year). Based on that wage rate, his net backpay for the fourth quarter of 2011 should be $18,165.88 (rather than $21,550.48).

5. Since Mr. Mack received retirement benefits with USPS to which he was not entitled with Respondent, the backpay calculation should reflect that fact.

Mr. Mack was hired by the United States Postal Service ("USPS") in March 2013. (Tr. at 53-54.) He testified that the USPS made contributions to a retirement plan on his behalf over a period of time, in the total amount of $5,000.00, and in which he was 100% vested at the time of his separation from the USPS. (Tr. at 89.) Since this was a substantial benefit to which he would

not have been entitled had he been employed by Respondent at that time (Tr. at 89), the total net backpay calculation should be reduced by $5,000.00.

6. The Compliance Specification should account for the fact that Mr. Mack worked an average of 50 hours per week for Respondent, and did not work that many hours per week throughout the back pay period.

Mr. Mack testified that he worked an average of 50 hours per week when employed by Respondent. (Tr. at 69-70.) It does not appear that the Board made any effort to account for that fact in calculating gross backpay or in the expectation that Mr. Mack should have been working, or seeking to work, approximately 50 hours per week during the entire period of time, as he did in the last half of 2015 and through the end of 2016. As such, his net backpay should be reduced by an appropriate amount, at least $12.00 per hour for the difference between 50 hours and the actual amount of hours he worked in any given week in all other quarters during the relevant period of time.

7. Mr. Mack's efforts to find interim employment from February 2010 to August 2010 and from June 2011 to February 2012 were not adequate and, therefore, his net backpay should be reduced accordingly.

Mr. Mack was unemployed from February 2010 to August 2010 and from June 2011 to February 2012. As set forth in the Compliance Specification, no interim earnings were shown for those periods of time, with the corresponding impact on net backpay for the quarters that included those periods of time. As explained in greater detail below, however, there were security jobs available during those periods of time, Mr. Mack was qualified for those jobs and he could have been employed in such jobs during these periods of time, earning up to $40,000 per year. As such, either he should not be entitled to any back pay for those portions of the relevant quarters or, in the alternative, he should be considered to have interim earnings for those periods of time at the rate of $10,000 per quarter.

Claude Seltzer is a certified vocational rehabilitation counselor, who testified on behalf of Respondent. Among other things, he evaluates people who need to find jobs, the kinds of are available, what those jobs pay, etc. (Tr. at 102-105.) He has testified in approximately 700 legal proceedings on issues such as explanations about the labor market, access to the labor market, analysis of transferrable skills, etc. (Tr. at 105.) Mr. Seltzer was accepted by Judge Ringler as an expert witness on the issue of what jobs were available in the Greater Miami area from February 2010 through April 2013, for which Mr. Mack was qualified. (Tr. at 105-106.)

In Mr. Seltzer's expert opinion, Mr. Mack was qualified to work as a security guard, and also as a supervisor in the security industry. From February 2010 through April 2013, there were numerous security industry positions available and for which Mr. Mack was qualified. (Tr. at 107, 111.) As a security guard, Mr. Mack could have earned approximately $30,000 per year. (Tr. at 112.) In addition, based on his experience and qualifications to work as a supervisor, Mr. Mack could have earned more, approximately $40,000 per year. (Tr. at 112-114.)

Mr. Seltzer was asked on cross-examination about whether security companies might have rejected Mr. Mack because he was overqualified and his opinion that Mr. Mack could have worked as a supervisor. In response, Mr. Seltzer explained that "a security company would – I think would be happy to offer a man with the qualifications that Mr. Mack has, and if he accepts it, then they would." (Tr. at 124.) As he further explained, Mr. Mack had very good experience in the security industry since he worked at a nuclear power plant, which is a very responsible position. (Tr. at 125.) "[W]hen people go into security guard work, they are very quickly promoted if they show any kind of expertise, if they show that they have any kind of motivation. Security positions I think are fairly easy to get. But I think that it's fairly easy then when we have a good employee for the employee to be promoted rather quickly." (Tr. at 126.) On re-direct examination, Mr.

Seltzer further explained that Mr. Mack was more qualified than the average person who would apply for a security officer position and, as such, it was more likely than not that a security company would have been willing to offer him a position and more likely than not that he would have been promoted fairly quickly to a higher position. (Tr. at 131-132.)

Mr. Seltzer also testified that, in his expert opinion, Mr. Mack did not use reasonable efforts to find a job during the relevant periods of time. Mr. Mack admitted that, throughout the relevant periods of time, he only submitted applications "on line." (Tr. at 60-61.) Unless a prospective employer asked him for some additional information, he did not take any action to follow up on any of those applications – no phone calls, no email message, no personal visits. (Tr. at 85-86, 114.) Mr. Seltzer explained that Mr. Mack should have gone in person to sites to attempt to interview in person and otherwise follow up in in person on his "on line" applications. (Tr. at 114.) As Mr. Seltzer further explained, even with new technology, it still is "always better to make an in-person effort than to just solely rely on let's say a telephone call or an internet job search." (Tr. at 115.)

For all these reasons, Mr. Mack did not meet his burden of mitigating his damages and the net backpay calculation should be reduced accordingly. Specifically, he should be deemed to have earned at least $576.92 per week ($30,000.00 per year) for all weeks during which he did not otherwise have interim earnings from February 16, 2010 (two weeks after he was terminated by Respondent) to mid-August 2010 (when he was hired by Rent A Wheel) and from mid-June 2011 (when he was terminated from Rent A Wheel) until February 2012 (when he was hired by Rent a Center).

8. The Board's imposition of "Excess Tax Liability" in this case is punitive rather than remedial and, therefore, should not be included in the Compliance Specification.

In addition to traditional back pay, the Board here also seeks to have Respondent pay Mr. Mack an additional $64,671.54 for "excess tax liability."[7] Such a remedy first appeared in *Latino Express, Inc.*, 359 NLRB 518 (2012) – a routine case involving the allegedly discriminatory discharge of two employees during a union organizing campaign. The Administrative Law Judge ("ALJ") found that the discharges violated Section 8(a)(1) and (3) of the Act, and ordered the employer to offer reinstatement to both and make them whole for any loss of earnings or other benefits. Interestingly, the ALJ decision did not mention excess tax liability. Therefore, the ALJ did not make any findings that two employees would, in fact, suffer adverse tax consequences by receiving a lump sum backpay award.

The employer in that case filed exceptions to the ALJ decision, and the acting general counsel in that case filed cross-exceptions, which included a request for the additional remedy of reimbursement for any excess federal and state income taxes the discriminatees may owe as a result of the backpay award. Despite recognizing that the requested additional backpay remedy represented "a marked departure from Board practice," the Board adopted the acting general counsel's position regarding the imposition of excess tax liability.

At the time *Latino Express* was decided, however, the composition of the Board included two members whose appointments had been challenged as being unconstitutional. In light of the decision of the U.S. Supreme Court in *NLRB v. Noel Canning*, 573 U.S. __; 134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid, the Board announced in

[7] The Board actually seeks to impose a greater amount of excess tax liability, which cannot be calculated until the final interest calculation is concluded. *See* Compliance Specification at 8, n.14.

Tortillas Don Chavas, 361 NLRB 10 (2014), that it had "considered *de novo* the rationale for the tax compensation," and found that the remedy effectuated "the policies of the Act," and thereby reestablished the *Latino Express* excess tax liability remedy.

Section 10(c) of the Act provides, in relevant part: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act."

In 1941, the U.S. Supreme Court examined the scope of the Board's authority under Section 10(c) of the Act in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). First, the Court observed that, "The powers of the Board as well as the restrictions upon it must be drawn from Section 10(c) . . . ." *Id*. at 187-88. Second, the Court made clear that the Board's enforcement of the policies embodied in the Act necessarily required limited judicial review. *Id*.

Section 10(c) has long been understood to empower the Board with broad discretion to fashion remedies that will carry out the policies of the Act. However, excluded from the Board's authority is the ability to issue punitive or deterrent measures upon parties who have committed unfair labor practices. *See Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 235-36 (1938) ("We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies

of the Act might be effectuated by such an order"). *See also Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) (parenthetical).

Although the Board tried to emphasize its remedial power under Section 10(c) in reaching its decision in *Latino Express, Inc.*, and framed the decision as an exercise of those remedial powers, deterrence was clearly a factor in its decision. The Board specifically recognized excess tax liability as a type of punitive measure in a footnote, stating: "We adopt a tax compensation remedy as a matter of make-whole relief. We note, however, that enhanced monetary remedies also serve to deter the commission of unfair labor practices and encourage compliance with Board orders. In this respect, the new remedy aids in our statutory goal of preventing unfair labor practices." *Latino Express*, 359 NLRB at 520-521, n. 34 (citations omitted).

Even though it has long been established that the Board enjoys broad remedial powers under Section 10(c), it is equally well-settled that the Board does not have the authority to impose punitive measures upon employers or unions to deter future misconduct. *Phelps Dodge, supra*; *Republic Steel Corp.,* 311 U.S. at 12 (1940). As the Supreme Court stated in *Republic Steel*, "The Board may fashion remedies that happen to deter unfair labor practices, but it may not premise a particular remedy on a deterrence rationale." *Id*. at 12.

It is an inescapable conclusion that deterrence was a clear motivational factor in the Board's *Latino Express* decision. Once again, the Board stated, "We adopt a tax compensation remedy as a matter of make-whole relief. We note, however, that enhanced monetary remedies also serve to deter the commission of unfair labor practices and encourage compliance with Board orders." 259 NLRB at 520-521, n. 34 (citations omitted). It is difficult (if not impossible) to imagine a respondent even contemplating the possibility of excess tax liability before taking adverse action

against an alleged discriminatee. As a result, it is quite a stretch to categorize this remedy a deterrent – that is a remedy that prevents a discriminatory act from occurring. Rather, excess tax liability clearly seeks only to punish a respondent. As such, the Board should overrule *Latino Express* and excess tax liability should not be part of the damages calculation in this case.

9. The Board should return to its prior practice of calculating damages annually.

The Act has been interpreted as "essentially remedial," *Republic Steel Corp.*, 311 U.S. at 10, meaning that Board orders should attempt to restore the situation to that which existed before any unfair labor practices occurred, and not provide alleged discriminatees with a windfall. *See Freeman Decorating Co.*, 288 NLRB 1235, 1235, n. 2 (1988) (the Board does not award tort remedies). However, under the Board's current approach to damages calculations, established in *F.W. Woolworth*, 90 NLRB 289 (1950), during a calendar year during the backpay period, an employee can make more money in interim earnings in a single calendar quarter than he or she made working for an entire year with the respondent, and still be entitled to backpay in the other three quarters of that calendar year during the backpay period. Such a result certainly seems punitive. *See Republic Steel*, 311 U.S. at 11 (Board not vested with "discretion to devise punitive measures").

Given that a fair calculation of back pay is more complicated when an alleged discriminatee has interim earnings which sometimes exceed estimated back pay, it is more reasonable for the Board to proceed on a case-by-case basis, rather than under blanket rule requiring quarterly damages calculations. *See Cherokee Marine Terminal*, 287 NLRB 1080, 1081 (1988) (the Board refused to adopt a blanket rule requiring visitatorial clauses in all cases).

For example, in Title VII cases, whether to calculate damages quarterly or annually is vested in the court's discretion. The Sixth Circuit has denied all back pay compensation when a

plaintiff's interim earnings exceeded her estimated back pay. *EEOC v. New York Times Broad. Serv., Inc.*, 542 F.2d 356, 359 (6th Cir. 1976) (noting that plaintiff "clearly was not damaged monetarily" where she later earned more than she would have in the position she sought). The Eighth Circuit has utilized an annual back pay calculation, such that if, in any given year, the plaintiff's earnings exceed her back pay award, the excess would not reduce the back pay owed in any other year. *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 693 (8th Cir. 1983) ("Under a year-by-year approach, when, as here, a plaintiff's interim earnings in any year exceed the wages he or she lost due to the discrimination, that 'excess' must not be deducted from any back pay for other years to which the plaintiff is entitled"). Other federal courts have also utilized a year-by-year approach to calculate back pay. *See, e.g.*, *Harkless v. Sweeny Independent School District*, 466 F. Supp. 457, 22 F.E.P. Cases 1557, 1567 (S.D. Tex.), *aff'd*, 608 F.2d 594 (5th Cir. 1979); *United States v. Lee Way Motor Freight, Inc.*, 15 F.E.P. Cases 1385, 1388-1389 (W.D. Okla. 1977), *aff'd in relevant part*, 625 F.2d 918 (10th Cir. 1979).

While the Eleventh Circuit does calculate back pay on a quarterly basis, *Darnell v. City of Jasper, Ala.*, 730 F.2d 653 (11th Cir. 1984), other courts have declined to follow this approach on the theory that it departs from the "make whole" principle of Title VII and thus may result in a windfall to plaintiffs. *See, e.g.*, *Sinclair v. Ins. Co. of N. Am.*, 609 F. Supp. 397, 402 n. 3 (E.D. Pa. 1984), *aff'd sub nom. Appeal of INA Corp.*, 782 F.2d 1029 (3d Cir. 1986) and *aff'd sub nom. Appeal of Sinclair*, 782 F.2d 1031 (3d Cir. 1986) and *aff'd sub nom. Sinclair v. Cigna Corp.*, 782 F.2d 1031 (3d Cir. 1986) ("The *Leftwich* rule may assure that employers do not benefit from employee's 'excess' earnings. However, in my opinion, it has an overriding disadvantage of discouraging mitigation").

For the foregoing reasons, the Board should overturn its current practice of calculating damages on a quarterly basis, so as to avoid potential windfalls to alleged discriminatees.

/s/Fred Seleman
Fred Seleman
Vice President, Labor & Employment Law
G4S Secure Solutions (USA) Inc.
1395 University Boulevard
Jupiter, FL 33458
Phone: 561.691.6582
Fax: 561.691.6680
Email: fred.seleman@usa.g4s.com

Certificate of Service

On July 9, 2018, the foregoing was filed electronically and a copy served by way of electronic mail on Thomas Frazier at tomfrazier@gmail.com; Cecil Mack at cecilmack3@gmail.com; and John King, Counsel for the General Counsel, at John.King@nlrb.gov. Undersigned counsel attempted to file the foregoing electronically on July 6, 2018, but could not do so because the Board's electronic filing system was not operational at that time, and the system advised that the deadline for submissions on July 6, 2018, was extended to July 9, 2018.

/s/ Fred Seleman
Fred Seleman
Vice President, Labor & Employment Law
G4S Secure Solutions (USA) Inc.